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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-215

JOEL H. DARK - - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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May it please the Court:

1. In its Brief in Opposition, the United States argues that Petitioner's proffered evidence was properly excluded, saying, "Apart from the immateriality of the proposed testimony, it did not challenge the accuracy of the government's evidence or raise any issue of disputed fact" (Brief in Opp., p. 6). The United States fails to address itself to why it contends Petitioner's evidence is immaterial. Petitioner has demonstrated his rejected evidence *is* relevant and material to the single issue in dispute—the presence or absence

of criminal willfulness. As Petitioner has indicated, a review of those factors and circumstances relied upon by the government in reported tax cases to indicate the existence of criminal willfulness reveals a primary factor to be a showing of a large amount of income with a large resulting tax liability. This fact is also revealed in the testimony of government witness Grant Porter in Petitioner's trial (testifying concerning the prior late-filed returns):

> "Q. It left Mr. Dark getting a refund, even after all these years, of some four hundred and seventy-two or three dollars, isn't that correct?
>
> A. Yes, sir, that was the primary reason I closed the case." (Tr. 128).

and

> "Q. I think you indicated that your recommendation was that the case be closed, and you used the term 'under instructions'. Now, what type of instructions were you under to recommend that this type of case be closed?
>
> A. Yes, I was going to state that we were not encouraged to make recommendations for prosecution in cases where there wasn't a probability in our opinion, that a conviction would be obtained.
>
> It was my opinion that since the tax had already been paid, that Mr. Dark would probably not be convicted, since there would be no showing of harm to the government." (Tr. 129-130).

Thus Petitioner's disallowed evidence certainly did "challenge the accuracy of the government's evidence" in relation to its bearing on the only disputed issue.

The viewpoint of the United States expressed in this case would preclude a defendant in a murder trial from pleading self-defense—if the defendant "pulled the trigger," the defendant's evidence relating to circumstances and motive would be immaterial following the logic of the government here expressed.

Petitioner's contention is well stated in *United States* v. *Brown,* 411 F. 2d 1134 (10th Cir., 1969):

> "The critical issue to be considered by the jury in this case was not a determination of the acts done by Brown but whether such acts, largely admitted, were done with the specific intent to violate sections 7201 and 7206(1), a necessary element of the charges. (Citing cases.) Accordingly, the accused as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent."

Additionally, the statement that evidence of Petitioner's income was before the jury (Brief in Opp., p. 7) is in error. A document physically introduced but neither read nor seen by judge or jury cannot be said to be "before" the trier of fact for consideration. Nor can the United States seriously contend that Petitioner's counsel was not precluded from arguing Petitioner's amount of income to the jury when, prior to that argument, the trial judge said, "If they do, I'll blow them out of the courtroom" (Tr. 273).

The government contends the exclusion from evidence of Petitioner's records was not error because that testimony allowed to be elicited "was sufficient to establish his point, *viz.,* that his record keeping system

was cumbersome and complicated" (Brief in Opp., p. 7). The exclusion of Petitioner's records resulted from the trial judge's "sustaining" an "objection" which had not been made by adversary counsel. This conduct towards Petitioner's attempt to defend himself from a criminal charge is diametrically opposed to the trial judge's conduct during the presentation of the "unnecessary" government evidence of Petitioner's gross income. There the trial judge allowed full freedom for the presentation of gross receipts of Petitioner far in excess of what the trial judge later decreed to be the only "material" amount—$750.00. A single witness for the government established this amount for both years in question. Yet the trial judge did not "object" for the Petitioner and "sustain" that "objection" to the presentation of "immaterial" evidence. This simply confirms Petitioner's assertions of differing standards having been applied to the prosecution and the defense as one revelation of the trial judge's obvious attitude toward Petitioner.

2. It is true that the trial judge included cursory instructions to the jury to the effect that they were to disregard any apparent attitude of his in reaching their verdict. However, the position and influence of the trial judge over the lay jury throughout the trial cannot be cured by cursory instructions. See *United States* v. *Nazzaro*, 472 F. 2d 302 (2nd Cir., 1973). The government again refers to the "isolated question" of the judge while cross-examining the Petitioner. The question considered by the Court of Appeals and discussed by the United States here was *not* isolated—it

was simply one "tile in the mosaic of the trial" in which the prosecutorial role of the trial judge predominated.

Cases reported by the Courts of Appeals of all circuits abound in considerations of the actions of the trial judge in conducting trials. One case cited by the United States in its Brief in Opposition (*United States* v. *Candelaria-Gonzalez*, 547 F. 2d 201 [5th Cir., 1977]) is supportive of the position of this Petitioner. A complete listing of the cases involving the conduct of the trial judge would probably include a majority of the reported cases. However, there is a lack of a definitive statement from this Honorable Court to serve to guide both appellate and trial courts in this vital area. Petitioner thus contends that exercise of this Court's supervisory power in this case and full consideration would furnish a guide for future cases and would serve the interest of the administration of justice in the land.

3. The United States contends that Petitioner's counsel should have proceeded to challenge the assertion of the government attorney that the prosecution had turned over to Petitioner everything relating to the subject matter of Hollingsworth's direct testimony. The trial court was informed by Petitioner of the identity of those items furnished Petitioner, and those items obviously did not include everything about which Hollingsworth had testified. Yet the trial judge foreclosed further discussion of the matter with his immediate acceptance of the government position and question to Petitioner's attorney, "Ready, Mr. Clark?"

(Tr. 146). Further argument after the trial judge's ruling and comment would have been contemptuous.

In *United States* v. *Polizzi,* 500 F. 2d 856 (9th Cir., 1974), cited by the United States, the court stated, "The prosecution is obligated to disclose to the defense statements falling within the Jencks Act *regardless of anyone's perception of the utility of the statements* for impeachment." (Emphasis supplied.) And this Honorable Court reiterated in *Killian* v. *United States,* 368 U. S. 231, 82 S. Ct. 302 (1961) its finding in *Rosenberg* v. *United States,* 360 U. S. 367, 79 S. Ct. 1231: "a court should not confidently guess what a defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled . . ."

The trial court in Petitioner's case shirked his duty to independently determine the existence, or non-existence, of producible statements and to make appropriate orders based upon that determination.

Therefore, Petitioner believes that there is a definite need for this Court to consider the conflicting holdings of the courts of appeals concerning the actions to be taken by a trial judge upon the raising by a criminal defendant of a Jencks Act question and to determine the correct resolution of the conflicts between the decision in this case and others regarding the identity of producible statements.

4. Petitioner has stated in his petition his position regarding returned subpoenas, yet the United States has not yet responded to Petitioner's contention that such are orders of the issuing court and thus properly

a part of the public record. The arguments and supporting cases regarding witness lists are not in point. Title 28, §569(c) provides, "The Attorney General shall supervise and direct United States marshalls in the performance of public duties . . ." Petitioner doubts the efficacy of a request, should he have made one, that the United States Marshall not inform his supervisor of Petitioner's subpoenas. Moreover, Petitioner believes such a request to be improper for either the Petitioner or the United States Attorney since it seeks to routinely limit public access to court records.

5. The case cited by the United States in relation to the lack of an instruction by the trial court on the issue of a partnership (*United States* v. *Hall,* 552 F. 2d 273 [9th Cir., 1977]) is also not in point with Petitioner's contention. The true issue in *Hall* was whether substances were "chemically equivalent," and the court stated in its opinion, "Because the issue was not raised at trial *nor brought before us on appeal,* we do not decide whether an instruction on the definition of 'chemically equivalent' should have been given." As Petitioner pointed out to the court, the witness Jordan did deny in words that a partnership existed, yet he admitted to the facts which *under the law* constitute a partnership. The question was, therefore, not one of fact for the jury, but one of *law* for the judge to instruct the jury upon. The partnership issue was vital to the question of the credibility of the Petitioner at trial, where the only disputed issue was the presence or absence of criminal willfulness, an issue upon which only the Petitioner could offer direct evidence.

6. Petitioner has not alleged error in the wording of the jury instructions on willfulness given by the trial judge because of his knowledge that these instructions were in accord with *United States* v. *Pomponio*, 429 U. S. 10, cited by the United States. He does contend the interpretation of those words is a matter requiring further clarification by this Honorable Court as evidenced by the judge's question during oral argument in the Court of Appeals for the Sixth Circuit as presented in his petition. The importance of the essential element of willfulness in the criminal tax statutes cannot be overstated, and the exclusion of Petitioner's proffered evidence bearing on this sole disputed issue coupled with the obvious misinterpretation of the term necessitates further clarification from this Court.

For the above stated reasons, as well as those contained in the Petition for Writ of Certiorari, certiorari should be granted and the judgment reversed.

Respectfully submitted,

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